

<b>Shahin v Jairrabrandy Realty Enter., LLC</b>
2021 NY Slip Op 31165(U)
March 25, 2021
Supreme Court, Kings County
Docket Number: 500634/18
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25<sup>th</sup> day of March, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

-----X  
SALAH SHAHIN,  
Plaintiff,

- against -

JAIRRABRANDY REALTY ENTERPRISE, LLC,  
Defendant.

-----X<sup>1</sup>

**DECISION AND ORDER**

Index No. 500634/18  
Mot. Seq. No. 5 and 7

The following e-filed papers read herein:

NYSCEF No.:

Plaintiff's Notice of Motion, Supporting Affirmation, and Exhibits Annexed	<u>71-75</u>
Defendant's Cross Motion, Supporting Affirmation, and Exhibits Annexed	<u>83-90</u>
Plaintiff's Opposition and Exhibits Annexed	<u>94-95</u>
Defendant's Reply Affirmation and Exhibits Annexed	<u>99-103</u>
Case Scheduling Order (Non-City Cases), Dated Jan. 21, 2021	<u>91</u>

In this action to recover damages for personal injuries, plaintiff Salah Shahin (plaintiff) moves in Seq. No. 5 for an order, in effect, pursuant to CPLR 2221 (d), to reargue the prior motion of defendant Jairrabrandy Realty Enterprise, LLC (defendant) which was for an order, pursuant to 22 NYCRR 202.21 (e), vacating the note of issue (the prior motion), and, upon reargument, denying the prior motion and vacating the order, dated Aug. 28, 2020, which granted the prior motion (NYSCEF #69) (the prior order). Defendant opposes and cross-moves in Seq. No. 7 for an order imposing sanctions on plaintiff in accordance with 22 NYCRR 130-1.1 (c), and, in addition, awarding it attorney's fees.

<sup>1</sup> The caption reflects the prior dismissal of the remaining defendant Angaad Sooknandan by decision and order, dated Aug. 18, 2019 (NYSCEF #57).

### *Background*

On Feb. 27, 2015, plaintiff allegedly sustained injuries when he slipped and fell in front of the non-residential premises owned by defendant (NYSCEF #2).

On Jan. 11, 2018, plaintiff commenced the instant action (NYSCEF #1).

On Nov. 4, 2019, defendant served its answer (NYSCEF #60). Defendant's answer was timely served in accordance with the decision and order, dated Aug. 18, 2019 (NYSCEF #57).

On Dec. 5, 2019, plaintiff filed a note of issue and certificate of readiness (NYSCEF #61).

On Dec. 20, 2019, defendant served the prior motion for an order vacating the note of issue (NYSCEF #63). Defendant contended that no discovery had been conducted before plaintiff filed the note of issue (*see* Affirmation in Support [NYSCEF #64], ¶ 14).

In addition, defendant asserted that:

“On December 9, 2019, [defendant's counsel] had a phone conversation with [plaintiff's counsel] and asked [plaintiff's counsel] to withdraw the Note of Issue since it was clearly filed [in] error. Although [defendant's counsel] clearly advised [plaintiff's counsel] that the Defendant needs to conduct discovery and this Action is not ready for trial, he refused to voluntarily withdraw the Note of Issue. However, at the same time, [plaintiff's counsel] indicated that the Plaintiff would respond to any upcoming Defendant's discovery demand and deposition of the Plaintiff.”

(Affirmation in Support, ¶ 15).

Plaintiff filed no opposition or other response to the prior motion.

At a hearing on the prior motion on Aug. 28, 2020, the note of issue was vacated.

The prior order stated, in full, as follows:

“Defendant moves unopposed to vacate [the] NOI (mot. seq. 4). *Movant further represents that plaintiff’s counsel consents*, although plaintiff has filed no papers. No PC has been held. Based on all of the foregoing the motion is granted. The NOI is vacated. The parties are directed to go on-line to the court’s web site, complete and submit their PRELIMINARY CONFERENCE order electronically by 12/3/2020.”

(Order, dated Aug. 28, 2020 [NYSCEF #69] [emphasis added]).

Notwithstanding the aforementioned directive of the prior order, the parties failed to complete and submit the preliminary conference order by Dec. 3, 2020. Instead, they engaged in the instant motion practice, focusing on the italicized language of the prior order (*i.e.*, whether plaintiff’s counsel had consented to the vacature of the note of issue, or not).

At a preliminary conference conducted on Jan. 21, 2021, the Court issued the Case Scheduling Order (Non-City Cases) which established various discovery deadlines, set the case for a mandatory compliance conference on June 10, 2021, and directed that a new note of issue be filed by no later than Sept. 30, 2021 (NYSCEF #91) (the PC order).

Thereafter, on Mar. 18, 2021, the instant motion and cross motion were fully submitted, with the Court reserving decision.

### *Plaintiff's Motion*

A motion for leave to reargue must be “based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion” (CPLR 2221 [d] [2]). “Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision” (*Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]). Here, the Court, in issuing the prior order, did not overlook or misapprehend the facts or law because it is undisputed that no discovery had been conducted by either side before plaintiff filed the note of issue. It is immaterial that the prior order indicated – erroneously, in plaintiff’s counsel’s view – that he consented to the vacatur of the note of issue. Rather, defendant on the prior motion demonstrated, without opposition to plaintiff, that discovery was incomplete in that, among other things, the depositions of the parties and a physical examination of plaintiff had not occurred, and that the case was not ready for trial (*see Singh v CBCS Const. Corp.*, 137 AD3d 1250 [2d Dept 2016]). Accordingly, leave to reargue is denied.

### *Defendant's Cross Motion*

“The decision of whether to award sanctions [under 22 NYCRR 130-1.1 (c)] and the amount or nature of those sanctions is generally entrusted to the trial court’s sound discretion” (*Matter of Khan-Soleil v Rashad*, 111 AD3d 727, 728 [2d Dept 2013]). Likewise, “[a]n award of attorney’s fees lies in the sound discretion of the trial court, and

the issue is controlled by the equities and circumstances of each particular case” (*Prochilo v Prochilo*, 165 AD3d 1304, 1304 [2d Dept 2018] [internal quotation marks omitted]). Here, defendant has failed to prove that plaintiff’s motion was completely without merit (*see* 22 NYCRR 130-1.1; *see also Battinelli v Battinelli*, \_\_\_ AD3d \_\_\_, 2021 NY Slip Op 01741 [2d Dept 2021]). Further, the remaining branch of defendant’s cross motion which is for an award of attorney’s fees is denied in the Court’s discretion (*see Winter v Winter*, 167 AD3d 822, 822-823 [2d Dept 2018]).

**Conclusion**

Accordingly, it is

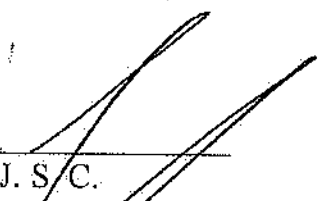
ORDERED that in Seq. No. 5, plaintiff is *denied* leave to reargue defendant’s prior motion; and it is further

ORDERED that in Seq. No. 7 defendant’s cross motion is *denied in its entirety*.

Plaintiff s counsel is directed to electronically serve a copy of this decision and order with notice of entry on defendant’s counsel and to electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the decision and order of the court.

ENTER,



J. S. C.

HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE